PREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 321

FRANK J. RAGEN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Appellate District, State of California.

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Opinion Below.

The opinion of the State Court of Appeal is reported in 262 Adv. Cal. App. 396, 68 Cal. Rptr. 700. It is printed in Appendix I to this petition.

Jurisdiction.

1. The jurisdiction of this Court is invoked to review a final decision of the highest court of the State in which a decision could be had, on the ground that there was drawn in question a right, privilege and immunity claimed by the petitioner under the Constitution of the United States, in that material evidence, admitted against the petitioner, was obtained and used by the State in violation of petitioner's right to be secure from unreasonable searches and seizures, and in violation of his right not to be deceived into involuntarily

incriminating himself, and in violation of his right to be informed of his rights to silence and counsel.

2. The date of the judgment sought to be reviewed, as well as the time of its entry, was May 22, 1968. It became final below on July 21, 1968. [See, *California Rules of Court*, rules 24(a), 28(a); *West's Annotated California Codes*, vol. 23, part 1, rules 24(a), 28(a).[1]]

3. A timely petition for rehearing was filed in the State Court of Appeal on June 6, 1968, and denied, without opinion, on June 20, 1968. A timely petition for a hearing in the State Supreme Court after decision by a Court of Appeal, was filed in the Supreme Court on June 28, 1968 and denied by that Court, without opinion, on July 17, 1968.

4. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. Code, § 1257(3).

Questions Presented.

1. Is it an unreasonable search and seizure, under the Fourth Amendment to the Constitution of the United States, as interpreted in *Katz v. United States*, 389 U. S. 347, and *Berger v. New York*, 388 U. S. 41, surreptitiously and by electronic means, to intercept and record telephone conversations between the defendant (upon whom suspicion had then definitely focused) and a police agent (but not disclosed to the suspect to be

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[1]The rules cited, so far as material here, read as follows:

"RULE 24. (a) . . . A decision of a Court of Appeal becomes final as to that court 30 days after filing . . .

* * *

"RULE 28. (a) Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court . . . may order the cause transferred to itself for hearing and decision . . ."

acting as a police agent), which conversation the suspect believed and had the right to believe was private?

2. When in the course of such conversations incriminating statements or admissions are obtained by means of deception and false representations (*i.e.*, by suppressing the fact that the purported telephone calls were in reality an accusatory interrogation by the police, and by the false representation that the police were not involved), are the statements and admissions involuntary within the meaning and effect of the Due Process Clause of the Fourteenth Amendment, even though the deception did not necessarily tend to produce untrue statements?

3. When police and prosecutorial officers of the State, for the admitted purpose of eliciting incriminating statements, undertake a telephonic interrogation of one upon whom suspicion of commission of a crime has definitely focused, and whom the officers have decided to arrest, has such a critical stage been reached as to require that the suspect be informed of his constitutional rights to silence and the presence and assistance of counsel?

Constitutional Provisions and Statutes Involved.

1. The Fourth Amendment to the Constitution of the United States, reading as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fourteenth Amendment to the Constitution of the United States, section 1, reading as follows:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code:

(a) "§261. Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:

"1. Where the female is under the age of eighteen years.

* * * *

4. Where she is prevented from resisting . . . by any intoxicating, narcotic, or anaesthetic, substance admitted by or with the privity of the accused." [California Statutes, 1913, c. 122, p. 212, §1.]

(b) §264. Rape is punishable by imprisonment in the state prison not less than three years, except where the offense is under subdivision 1 of Section 261 . . . in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than 50 years . . ." [California Statutes, 1923, 1st Ex. Sess., c. 23, §1.]

(c) "§288a. Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprison-

ment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year . . ." [California Statutes, 1955, c. 274, p. 729, §1.]

Statement of the Case.

1. The Facts Material to Consideration of the Questions Presented.[2]

Petitioner, a doctor of medicine [Rep. Tr. (VII), p. 2027, lines 13-24], was convicted of sex crimes [*Cal. Penal Code*, secs. 261, 288a, pp. 4-5, *supra*], allegedly committed, several years apart, against two of his female patients.[3] One of the patients, Diane, com-

[2]The following abbreviations are used in this petition, in referring to the record:

"*Clk. Tr.*"—Clerk's Transcript.

"*Rep. Tr.*"—Reporter's Transcript.

Because the Reporter's Transcript is here in eleven volumes, we indicate the number of the volume referred to by the parenthetical Roman numeral in the reference.

[3]The evidence summarized in this Statement is that presented by the prosecution. We do not touch the defense at all, except to say that it was a strong one; the jury deliberated for five days before reaching a verdict. [Rep. Tr. (X), p. 2877, line 1; p. 2930, lines 15-25; p. 2994, lines 1-10.] The petitioner unequivocally denied the charge [Rep. Tr. (VII), p. 2057, lines 15-25; p. 2076, line 24, to p. 2077, line 9]; a thorough and complete medical examination of Diane, the prosecutrix who complained shortly after the alleged offense, made less than three hours later, by a doctor selected by the police, showed no sign of recent sexual intercourse. [Rep. Tr. (II, III, IV), p. 327, lines 5-14; p. 339, line 11, to p. 341, line 21; p. 552, line 6, to p. 553, line 18; p. 742, line 3, to p. 744, line 10; p. 970, line 16, to p. 972, line 10; p. 974, line 5, to p. 976, line 12; p. 982, line 4, to p. 998, line 24.] Five other doctors testified, without contradiction, that if sexual intercourse had taken place when and as related by Diane, some signs of it would usually be found, so soon afterwards, about the female genitalia; and, if no such signs were found, their professional opinion would be that sexual intercourse had not taken place. [Rep. Tr. (V, VI), p. 1429, line 26, to p. 1433, line 7; p. 1481, line 23, to p. 1482, line 22; p. 1539, line 8, to p. 1542, line 13; p. 1579, line 13, to p. 1580, line 17; p. 1602, line 11, to p. 1604, line 24; p. 1618, line 12, to p. 1620, line 18.]

plained to the police. [Rep. Tr. (IX), p. 2495, lines 4-6; p. 2497, line 6, to p. 2533, line 25.] After hearing her story, the police determined, subject to consultation with the prosecutor's office the next day, to arrest petitioner. [Rep. Tr. (II), p. 326, line 25, to p. 327, line 26; p. 339, line 11, to p. 344, line 2; p. 352, line 11, to p. 353, line 16.] During the consultation with the prosecutor it was decided that an effort would be made to elicit incriminating statements from petitioner, by having Diane carry on an accusatory interrogation of him over the telephone. [Rep. Tr. (II), p. 344, line 13, to p. 345, line 16; p. 354, line 26, to p. 355, line 6; p. 382, lines 18-22; p. 383, lines 14-22; p. 389, lines 17-24.]

The consent and cooperation of Diane and her parents having been obtained, the necessary arrangements were made by the police to carry the planned interrogation into effect. The telephone in Diane's home was tapped and connected to a tape recorder. [Rep. Tr. (II), p 328, line 1, to p. 330, line 7; p. 335, line 23, to p. 336, line 3; p. 344, line 2, to p. 345, line 18; p. 353, line 20, to p. 356, line 25; p. 357, line 25, to p. 361, line 18.] A series of questions to be put by Diane to the petitioner was prepared by the prosecutor and police officers and submitted to Diane, who was instructed by them to call petitioner and ask him the prepared questions. She did so; and in addition, asked several questions suggested by the officers while she was talking to petitioner. The questions were strongly accusatory in tenor; and were obviously designed for their "shock effect." Diane was acting throughout "in response to the specific request of the police department" to do precisely what she was doing; and, in fact was

being supervised and directed by the police as the calls were in progress.[4] [Rep. Tr. (II), p. 329, line 4, to p. 330, line 7; p. 334, line 18, to p. 335, line 13; p. 344, line 12, to p. 347, line 15; p. 358, line 2, to p. 363, line 20; p. 369, line 9, to p. 370, line 11.] The intended purpose of this operation, the prosecutor involved in it admitted, was "to engage in a process of interrogation of the Doctor designed to elicit from him statements which may have incriminated him in connection with the charges . . ." [Rep. Tr. (II), p. 382, line 18, to p. 383, line 19.]

There were two telephone conversations between Diane and the petitioner. In the first one petitioner, bringing it to a close, because he was being called for a surgical engagement, was asked by Diane to call back. He said he would. [Rep. Tr. (II), p. 415, line 16, to p. 416, line 4.] He did so, but in the interval the police officers played the tape for the prosecutor, who was not pleased with the results. He thought there still were things in it that could be explained. [Rep. Tr., p. 329, lines 10-22; p. 363, line 3, to p. 370, line 23.] The officers, therefore, waited for the second call which came through in the afternoon. It too was intercepted and taped. [Rep. Tr. (II), p. 366, line 4, to p. 369, line 3.]

Petitioner was not told at any time that he was being subjected in fact to an interrogation by the police,

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[4]As a consequence of the nature and extent of the police and prosecutorial participation in and direction of Diane's activities, there is no doubt that she was acting as an agent or instrumentality of the police; and that her conversations with petitioner were realistically and in law a police interrogation. [*People v. Tarantino*, 45 Cal. 2d 590, 595, 290 P. 2d 505, 509; *People v. Rogers*, 22 Cal. 2d 787, 805, 141 P. 2d 722, 731; *Corngold v. United States*, 9 Cir. (*en banc*), 367 F. 2d 1, 4-6.]

or that he had a constitutional right to remain silent and to have the presence and assistance of counsel. To the contrary, he was falsely assured that no complaint had been made to the police. No warrant for this search was had from any magistrate or other neutral authority. [Rep. Tr. (II), p. 418, line 22, to p. 419, line 8; p. 425, lines 5-8.]

These recorded conversations, over petitioner's continuing objection [Rep. Tr. (II), p. 215, lines 3-25; p. 226, line 26, to p. 227, line 14; p. 337, line 4, to p. 338, line 9; p. 391, line 5, to p. 398, line 25; and see, Appendix II, pp. 16-17, *infra*], were twice heard in their entirety by the jury; and in substantial part a third time. Also, a stenographic transcription of them was supplied each juror.[5] [Rep. Tr. (II, VIII, X), p. 402, lines 19-21; p. 404, line 13, to p. 407, line 6; p. 2109, line 20, to p. 2110, line 14; p. 2124, line 11, to p. 2125, line 7; p. 2935, line 1, to p. 2937, line 10.] The conversations were characterized by the court below as incriminating, being ones in which petitioner, at first, "denied everything with an occasional incriminating slip" but, in which later, be in substance "emotionally admitted his crime . . ." [262 Adv. Cal. App. at 401, 68 Cal. Rptr. at 702; Appendix I, p. 2, *infra*.]

The State Court of Appeal entertained but rejected petitioner's contentions that these statements were inadmissible, because obtained by unconstitutional means; *i.e.*, by an unreasonable search and seizure violative of the Fourth Amendment, as that Amendment was construed by this Court in *Katz v. United States, supra,* 389 U. S. 347 and *Berger v. New York, supra,* 388

[5]The impact upon the jury of the repetitious hearing of the recording of the statement seems obvious.

U.S. 41; and, as well, by deception, and without the giving of an *Escobedo* or *Miranda* type warning. [See, 262 Adv. Cal. App. at 401-403, 68 Cal. Rptr. at 702-704; Appendix I, pp. 3-6, *infra*.]

A petition to have the cause heard in the State Supreme Court after decision by a Court of Appeal, was seasonably filed. It was denied by the Supreme Court without opinion. The Court of Appeal, therefore, was the highest court of the State to which the cause could be taken. [*Hammerstein v. Superior Court*, 341 U. S. 491, 492. See, also, *Pacific Gas etc. Co. v. Police Court*, 251 U. S. 22, 24-25.]

2. Raising of the Federal Questions.

(a) It appears from the opinion of the State court that each of the questions here presented was considered and decided by that court. [See, 262 Adv. Cal. App. at 401-403, 68 Cal. Rptr. at 702-704; Appendix I, pp. 3-6, *infra*.] It is, therefore, "irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided . . ." [*Manhattan L. Ins. Co. v. Cohen*, 234 U. S. 123, 134. To the same effect: *Charleston Federal S. & L. Assn. v. Alderson*, 324 U. S. 182, 185-186. See, also, *Swain v. Alabama*, 380 U. S. 202, 222 (note 30); and, compare, *Ungar v. Sarafite*, 376 U. S. 575, 582-583.] In respect of the questions here presented, the State court in its opinion said:

> "Attacking the trial court's admission of his telephone conversation with Diane, Regan makes three unmeritorious contentions.
>
> "1) Ragen contends tape recording his telephone conversations with Diane constituted an un-

reasonable search and seizure. Relying on *Katz v. United States*, 389 U. S. 347 . . . and *Berger v. State of New York*, 388 U. S. 41 . . . Ragen correctly argues tape recording a telephone conversation is a search within the Fourth Amendment to the United States Constitution. The Fourth Amendment protects against *unreasonable* [court's italics] search and seizure. Neither *Katz* nor *Berger* dictates whether tape recording a telephone conversation is unreasonable where one party to the conversation consents to the recording . . . [262 Adv. Cal. App. at 401, 68 Cal. Rptr. at 702-703; Appendix I, p. 3, *infra.*]

"2) Ragen contends his telephone statements to Diane were involuntary because Diane's questions and accusations deceived him and incited fear and panic . . . Deception, however, does not render statements inadmissible if it is not of a type reasonably likely to procure an untrue statement . . . We are convinced the deception practiced here, Diane's not telling Ragen about the police recording the planned questioning, was not reasonably likely to procure an untrue statement . . . [262 Adv. Cal. App. at 402-403, 68 Cal. Rptr. at 703; Appendix I, pp. 4-5, *infra.*]

"3) Ragen contends his telephone statements to Diane were inadmissible because before taping them the police did not warn him of his constitutional rights as stated in *Miranda v. Arizona*, 384 U. S. 436. Conceding he was not in custody or under arrest when the police recorded the conversations, Ragen argues custody is not an indispensable requirement before a *Miranda* warning is required

> . . . Ragen was not deprived of his freedom of action in any significant way. He could have hung up. He did not have to call Diane. His statements, therefore, were admissible, considering the totality of circumstances, although he had not been warned of the *Miranda* rights . . ." [262 Adv. Cal. App. 2d 403, 68 Cal. Rptr. at 703-704; Appendix I, pp. 5-6, *infra.*]

(b) Petitioner's opposition to the use in evidence of the taped recordation of the intercepted telephone calls took two general forms.

First, in addition to testimony otherwise adduced, there was extensive *voir dire* examination of the witnesses who identified the tape, for the purpose of putting into the record the facts relating to the circumstances in which it was made. [Rep. Tr. (II), p. 331, line 15, to p. 338, line 9; p. 339, line 1, to p. 370, line 23; p. 377, line 19, to p. 387, line 9.] The evidence in this regard is appropriately summarized at pages 6-8, *supra.*

Second, there was a statement of the general grounds of petitioner's objection to use of the tape in evidence.[6] That objection was made at the first practicable opportunity. Even before the prosecution's opening statement was made, the trial court was informed there would be an objection to admission or use of the tape recording. [Rep. Tr. (I), p. 215, line 3, to p. 216, line 1. Appendix II, *infra* p. 16.] When the existence of the tape was first mentioned in the prosecution's opening statement, petitioner's rights in respect of it were re-

[6]The portions of the record relied on in this respect are voluminous. They are, therefore, included in Appendix II to this petition.

served.[7] [Rep. Tr. (I), p. 227, line 24, to p. 228, line 17. Appendix II, *infra*, p. 17.] And, after the tape had been identified and the circumstances of its making brought out, a lengthy objection to it was made. [Rep. Tr. (II), p. 332, line 5, to p. 333, line 3; p. 391, line 3, to p. 398, line 25; p. 404, lines 13-19.] The substance of the objection, so far as here relevant, was that in talking to Diane, petitioner was talking with an agent of the prosecutorial authorities at a time when inquiry had certainly focused upon him [Rep. Tr. (II), p. 392, line 25, to p. 393, line 6]; that the rule of *Escobedo*, *Miranda* and *Massiah*, therefore, was, applicable, notwithstanding the absence of custody at the time[8] [Rep. Tr. (II), p. 393, line 18, to p. 398, line 13]; and that the recording had not been made in compliance with the requirements of Federal and State law.[9] [Rep. Tr. (II), p. 398, lines 16-22. Appendix II, *infra*,

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[7]The tape and its admissibility had already been the subject of informal discussions and "debate" in Chambers between counsel and the trial Judge. [Rep. Tr. (II), p. 391, lines 18-21.]

[8]The reference here, as the context shows, was to *Escobedo v. Illinois*, 378 U. S. 478; *Miranda v. Arizona*, 384 U. S. 436; and *Massiah v. United States*, 377 U. S. 201.

[9]This ground, which adumbrates the *Berger-Katz* question [see, p. 2, *supra*], was made in general terms. It could not then have been more specific, as it was made 2½ years before *Berger* and 3 years before *Katz* were decided. *Olmstead*, *supra*, 277 U. S. 438, which very likely would have made the Fourth Amendment objection a fruitless one, was then still in the ascendancy. Petitioner was not bound to anticipate that the *Olmstead* case would be overruled; but, as soon as it was, the specific point was made in and entertained by the State Court of Appeal. In those circumstances, the federal question was "raised at the first opportunity . . ." [*Brinkerhoff-Faris Tr. etc. Co. v. Hill*, 281 U.S. 673, 676-678; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 319-320.]

pp. 18-24.] The objection was overruled. [Rep. Tr. (II), p. 398, line 26, to p. 404, line 23.]

Reasons for Allowing the Writ.

The allowance of a writ of certiorari is sought in this cause for the reason that the State court has decided federal questions of substance in a way that is not in accord with applicable decisions of this Court. The questions are important for they relate directly to frequently employed methods of investigating the commission of crime and the bringing of accusations thereof. They are methods that can be and are administered, contrary to the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment, in such a way as materially to abridge the rights of persons accused or suspected of having committed a criminal offense, and as to subvert the fairness of their trial. The decision below approves the use of such methods in the State of California; and furnishes a precedent for other states to follow; but it conflicts with decisions of United States Courts of Appeals.

ARGUMENT.

I.

An Unwarranted Search and Seizure by Police, Which Invades the Defendant's Personal Privacy, Is Not Made Lawful by a Stranger's Consent to the Invasion, Especially When the Stranger Is a Police Agent.

First: In *Katz v. United States,* 389 U.S. 347, coming shortly after and enlarging upon *Berger v. New York,* 388 U. S. 41, this Court made it certain that a telephone conversation is within the protection of the Fourth Amendment; and that electronic interception of it is a search and seizure which, if made without a warrant or equivalent interposition of a neutral or impartial authority, is *per se* unreasonable. The State Court evaded this rule in a way that nullifies it in its application to a conversation to which one of the parties is a police agent. That court, acknowledging that under *Katz* and *Berger* "tape recording is a search within the Fourth Amendment to the United States Constitution," nonetheless held that the search here involved was not unreasonable, because one of the parties to it—the police agent, *not* the accused—had "consented" to it. [262 Adv. Cal. App. at 401, 68 Cal. Rptr. at 702-703; *Appendix,* pp. 3-4, *infra.*] That escape from the authoritative force of *Katz* and *Berger* is not consonant with the rationale of those cases.

It has long been true that what is "at the core of the Fourth Amendment" is "the security of one's privacy against arbitrary intrusion by the police . . ." [*Berger v. New York, supra,* 388 U. S. at 53; *Wolfe v. Colorado,* 338 U. S. 25, 27] This means, as was emphatically pointed out in *Katz, supra,* 389 U. S. at

351, that the "Fourth Amendment protects people not places . . ." Obviously, if it is one's privacy that is protected "against arbitrary intrusion by the police," it is not for the police or one of their agents to waive that privacy and permit or "consent" to its being intruded upon. [*Cf., United States v. Blok,* D.C. Cir., 188 F. 2d 1019, 1021; *People v. Cruz,* 61 Cal. 2d 861, 866-867, 395 P. 2d 889, 892-893, 40 Cal. Rptr. 841, 844-845; *Tomkins v. Superior Court,* 59 Cal. 2d 65, 68, 378 P. 2d 113, 116, 27 Cal. Rptr. 889, 892.]

A telephone conversation between two persons, one of whom, unknown to the other, is a police agent, is as to the non-police party, one from which he intends to exclude the "uninvited ear." It is and should be just as much within the protection of the Fourth Amendment as one between wholly private persons. The criterion of protectability in this connection is not the identity or status of the talkers, but the intention of the one against whom the results of the search are sought to be used. The protection is given precisely because the call is, or is rightfully believed to be, a private one, which in fact is heard only by those known to be parties to it. It is, therefore, as to the one so believing and intending, entitled to be heard by no one else other than those who have satisfied a magistrate or other neutral authority of the overriding necessity for intruding upon it. [*Katz v. United States, supra,* 389 U.S. at 351-352, 359.] To permit that privacy to be invaded, simply with the consent of those whose invasion the Amendment seeks to prevent, is, we submit, to eviscerate the Amendment. Nothing in *Katz* or *Berger* calls for or permits any such ready stultification of the principle they expound and enforce.

The importance of the question posed by the State court's decision is, we think, self evident. Use of an informant to elicit incriminating statements from one suspected of crime, is a common device. But, like any other device or stratagem of enforcement designed to accomplish the same purpose, it must be employed within the limits set by this Court's interpretation of the Constitution. Brute force, psychological coercion and trickery and deception are also effective devices to elicit incriminating statements and bring a suspected offender to book. They are proscribed. [See, cases cited, p. 19, *infra.*] So is arbitrary intrusion upon privacy by the police. No more in the latter case than in the others may the limitations of the Constitution be evaded at the mere will of those whose official conduct it is the purpose of those limitations to hold in appropriate check.

Second: The State court believed it had support, in *Hoffa v. United States,* 385 U. S. 293, and *Lopez v. United States,* 373 U.S. 427, for its formulation of an exception to *Katz.* [See, 262 Adv. Cal. App. at 401-402, 68 Cal. Rptr. at 702-703; Appendix I, pp. 3-4, *supra.*] We may assume for argument's sake that the court below correctly read those two decisions.[10] That very fact

[10]The differences of the instant case from *Hoffa* and *Lopez* are many and significant. First, neither *Hoffa* nor *Lopez* was concerned with the question whether one's constitutionally protected privacy could be waived by another. Second, in each of them what was involved was not interception and use of a private conversation by the "uninvited ear," but its repetition by one with whom it was freely had and who, it was mistakenly assumed, would not repeat it. At bar the reliance, justifiable as *Katz* determines [389 U. S. at 351-352, 359], was on the fact

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suggests the need for an inquiry by this Court into the question whether *Berger* and *Katz* have left any vitality in *Hoffa* and *Lopez*. The latter cases owe a large part of such vitality as they may have had, to the point of view fostered by *Olmstead v. United States*, 277 U. S. 438. *Olmstead* "and its offspring" [see, *Berger v. New York, supra*, 388 U.S. at 64, Douglas, J., concurring], have been shorn of their force by *Katz* and *Berger*; and a different point of view, more nearly like that of the dissent of Mr. Justice Brandeis in *Olmstead*, has emerged. [See, *Katz, supra*, 389 U. S. at 352-354; *Berger, supra*, 388 U.S. at 51-53, 58-60, 64.]

Third: Other courts have not found any exception to *Katz* based on the waiver or consent of another to an invasion of one's constitutionally protected privacy. For example, in *United States v. White*, 7 Cir. (March 18, 1968), ... F. 2d ....., 36 U.S.L.W. 2613, *Katz* was applied to make inadmissible surreptitiously made recordations of conversations between the defendant and a government informer, notwithstanding the obvious

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that no uninvited ear was listening. [See, p. 8, *supra*.] Third there was no surreptitious interception or seizure of a telephone conversation reasonably believed to be private. Indeed, in *Hoffa*, there was no recordation at all. Fourth, the recordation that was made or used in *Lopez*, was used merely to corroborate a party's testimonial repetition of it. There it was the "invited ear" that did the testifying; here it was the "uninvited" one, as Diane did not herself testify to the content of the calls; she merely testified to the making and the authenticity of the recordation. [Rep. Tr. (II), p. 328, line 12, to p. 330, line 7; p. 334, line 18, to p. 337, line 1.] Fifth, the validity of *Olmstead* and the line of cases it engendered was not questioned. [See *e.g., Lopez, supra*, 373 U.S. at 438-439.]

fact of the informer's consent. Indeed, because of that consent Circuit Judge Castle dissented, thus emphasizing the point of the decision.

The same Court of Appeals, in *United States v. Hagarty,* 388 F. 2d 713, readily applied *Katz* to an eavesdropped recording of a conversation between the defendant and another in the latter's government office. The key to the problem, the court pointed out, was not that the conversation was had in a public office, but the fact that the defendant sought to exclude the uninvited ear. [388 F. 2d at 716.] Such surveillance, without the consent of *both* parties, was "out of harmony with present-day enforcement procedures." [388 F. 2d at 718.]" . . . Nothing in *Katz,* the court continued, "supports the carving out of an exception to the Fourth Amendment's requirements in the circumstances of this case."[11] [388 F. 2d at 719.]

In *Doty v. United States,* 10 Cir. (June 4, 1968) .... F. 2d ...., it was held that a taped recording of a telephone conversation between the defendant and an undercover agent was inadmissible under *Katz,* notwithstanding the agent's consent.

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[11]A petition for a hearing in bank was filed by the Government in *White* and granted. The hearing was had on September 11, 1968. The cause is now [September 30, 1968] under submission. In *Doty,* p. 18, *infra,* although the time within which the Government could file a petition for rehearing was extended to July 20, 1968, none was filed.

II.

The Constitution Bans Use of Self-Incriminatory Statements Induced by Police Deception, Whether or Not the Deception Tends to Produce Untrue Statements. The State Court Refused to Follow That Rule.

Having regard to such decisions as *Leyra v. Denno,* 347 U.S. 556, 571, *Spano v. New York,* 360 U. S. 315, 320-324, and *Rogers v. Richmond,* 365 U. S. 534, 540-541, there can be no legitimate doubt that a confession or admission induced by deception is as involuntary as one produced by physical or mental coercion. Such a confession or admission is inadmissible if "not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth . . ." [*Rogers v. Richmond, supra,* 365 U. S. at 543-544.] In the instant cause the court below did not evince the "complete disregard" enjoined by this Court's interpretation of the Constitution. To the contrary, the State court held the statements admissible precisely because the deception by which they were induced "was not reasonably likely to procure an untrue statement . . ." [See, p. 10, *supra.*]

Thus, at least so far as the large and populous State of California is concerned, the road has been cleared for the regular use of deception and trickery to obtain self-incriminatory statements from those suspected of crime, so long as the deception practiced is not likely to produce untrue statements. Uniformity in the interpretation and application of the Constitution's proscription of involuntary confessions or admissions, if nothing else, calls for review of a decision so flatly nugatory of the supremacy of the United States Constitution as interpreted by this Court.

III.

Because a Critical Stage Had Been Reached, Interrogation During Which Could and Would Be as Apt to Subvert Trial Rights as a Custodial Interrogation, Petitioner, While Being Subjected to a Police Interrogation, Even Though Not Then in Technical Custody, Was Entitled to Be Informed of His Constitutional Rights to Silence and the Presence and Assistance of Counsel.

No doubt, in relation to the right, as a precondition to a lawful police interrogation, to be informed of one's constitutional rights to silence and the presence and assistance of counsel, the cases so far decided by this Court have dealt with custodial interrogations. That should not mean that the line is forever or inexorably drawn at that point. Conceivably, an interrogation of one not then technically in custody or under arrest, may in some circumstances produce the same undesirable consequences as if the interrogation were a custodial one. When that is the case, and since it is the purpose of the rule to prevent those consequences, the rule should be the same as in the case of a custodial interrogation. The ultimate objective of the rule, it has been well said [79 Harvard Law Review 974], is "protection of the individual's trial rights from pretrial subversion by unfair methods . . ." That subversion may be as effectively accomplished by an interrogation carried on at a critical stage—*i.e.*, when suspicion has definitely focused on the one being interrogated, the purpose is to elicit incriminating statements, and the suspect's arrest is imminent—as if it were carried on a few

moments later in conjunction with an expression of the ritualistic formula of arrest.[12]

The proposition that the purpose of the rule is to prevent unfair subversion of a defendant's trial rights is certainly implicit, if not indeed explicit, in the cases from this Court. The discussion in *Massiah* of the need for a defendant facing trial to have the protective assistance of counsel in the pre-trial stages of the prosecution, is pregnant with that proposition. [See, 377 U.S. at 204-205.] So, too, is the similar discussion in *Escobedo* [378 U.S. at 484-488], re-affirmed and re-emphasized, as it was, in *Miranda.* [384 U.S. at 466.] The need to prevent subversion of a trial's fairness by excluding improperly obtained confessions or admissions, has been derived by this Court, from the "totality of circumstances" in which the incriminating statements were obtained, not from the mere circumstance that some formal stage in the procedure looking to trial had been reached. [See, *e.g., Spano v. New York, supra,*

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[12]Indeed, evasion of the rule and subversion of one's trial rights become easier if custody or arrest is an indispensable condition. The same kind of interrogation that might have been conducted at the police station, may be conducted, and electronically recorded, in the suspect's home or office, or at the prosecutor's office to which he has been invited, not commanded or forced, to appear—all without a formal or explicit arrest or taking into custody. Many incriminating statements then gotten would not be gotten if the suspect were told that he was under suspicion, he would know, from the mere fact of being suspected or arrested, that he was in danger. Many times, therefore, he would not talk and would ask for his lawyer to be with him, just as he would do if he were in custody or under arrest and given the required warning. The need of a warning is just as great when the critical stage has been reached. The instant case is an example. Had petitioner known he was being subjected to a police interrogation it is not likely he would have talked at all; for he asked if a complaint had been made to the police, but was falsely answered in the negative. The inference is plain that had he known the true situation from the start, he would not have talked. [See, pp. 7-8, *supra.*]

360 U. S. at 323; *Massiah v. United States, supra,* 377 U.S. at 204.]

The need to protect the fairness of the ultimate trial is just as acute, the dangers of subversion of trial rights are just as great, when a "critical stage" in the process leading to trial has been reached, as it is when the police-station or jail-house door-sill is crossed. In the former posture of affairs, arrest and formal charge are virtually as certain as if already accomplished. In *Escobedo,* this Court extended the *Massiah* rule to one who, unlike *Escobedo,* had not been formally charged. That difference of fact, the Court said, "should make no difference . . . the investigation had ceased to be a general investigation of 'an unsolved crime.' . . . Petitioner had become the accused [but not formally so], and the purpose was to 'get him' to confess his guilt despite his constitutional right not to do so . . ."[13] [378 U.S. at 485.] The same reasoning calls for applying the rule to one who, even though not formally arrested, is reasonably sure to be, and, being accusatorily interrogated, needs protection of his trial rights.

The question whether the *Escobedo-Miranda* doctrine should be applied to a pre-custodial interrogation carried on after a critical stage has been reached, has an obvious importance in the administration, State and Federal, of

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[13]The quoted language closely fits the case at bar. [See, pp. 5-6, *supra.*] The police here were not "trying to solve a crime, or even to absolve a suspect . . : They were rather concerned primarily with securing a statement from the defendant on which they could convict him . . ." [*Spano v. New York, supra,* 360 U.S. 323-324.]

the criminal law. The logical analogy of the rationale of the doctrine lends substance to the question. These considerations suggest the desirability of review of the instant case, in order that plenary briefing and consideration may be given to this question.

Conclusion.

A writ of certiorari to the Court of Appeal, Fourth Appellate District, State of California, should be granted.

Respectfully submitted,

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